

BARRY SKIDELSKY

Attorney at Law

655 MADISON AVENUE • 19th FLOOR • NEW YORK, NEW YORK 10021 • TELEPHONE (212) 832-4800 • FAX (212) 486-8668

ORIGINAL
FILE

Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554


October 3, 1992

Dear Ms. Searcy:

Transmitted herewith for filing are 1 original and 9 copies of my Comments regarding MM Docket No. 92-159 (Amendment of the Commission's Rules To Permit FM Channel and Class Modification by Application).

If there are any problems or questions, please contact me; and, thanks.

Cordially,



Barry Skidelsky

BdS:hp
att.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAIL BRANCH

Re MM Docket No. 92-159

Amendment of the Commission's Rules
To Permit FM Channel and Class Modification by Application

COMMENTS

In connection with the above referenced proceeding, Barry Skidelsky ("Skidelsky") hereby comments as follows.

1. On August 4, 1992, the Commission released a Notice of Proposed Rule-Making ("NPRM"), FCC 92-330, in which the Commission proposed to change its rules governing certain modifications of existing FM authorizations.

2. In relevant part, the Commission proposed to streamline its current two-step process by eliminating the rule-making step in circumstances where it largely duplicates the application process, and instead allow a licensee or permittee to seek such modifications by application alone, provided that no change in the allotment of any third party station would be required.

3. Skidelsky supports the adoption of such a rule change, as he concurs with the Commission that such action will reduce unnecessary duplication of efforts and costs for both the Commission and private parties, which better serves the public interest.

4. Skidelsky also concurs with the Commission that limitations are desirable to avoid harming core policy objectives, such as those reflected in the Commission's technical rules regarding separation and city grade coverage. See Sections 73.207 and 73.315 of the Commission's Rules. Also see NPRM paragraph 7.

5. These technical rules referred to above promote core policy objectives of the Commission, in part, in that they help avoid interference between existing and proposed stations; and, they ensure that a minimum field strength of 3.16 mVm be provided over a station's entire community of license. They also promote an efficient use of the spectrum, in accord with Section 307 of the Communications Act of 1934, as amended.

6. Skidelsky supports the Commission's proposal to limit the availability of the new one-step procedure only to those proposals that comply with both allotment and application criteria, especially as to spacing and city grade requirements.

7. Skidelsky believes that the best means of reaching this objective would be to require that any application filed pursuant to the new procedure meet minimum distance separation and city grade standards as applied in the allotment context, without making use of less restrictive application standards such as contour protection (regarding spacing) (see Section 73.215 of the Commission's rules) or substantial compliance (regarding city grade coverage) ¹.

8. Such use of the more restrictive allotment standards as proposed would present no substantive change in current practice, nor any hardship to private parties, while such a

¹ "Substantial compliance" is, in effect, a waiver of Section 73.315 of the Commission's rules. It requires a showing of at least 80% city grade coverage and is used in connection with applications but not allotments. It had its origins in two staff rulings made at branch levels: John R. Hughes, 50 Fed. Reg. 5679, released February 11, 1985 (AM Branch?); and, Southwest Communications, Inc., reference 8920-HVT, released July 16, 1986 (FM Branch). In Southwest, the Commission expressly declined to consider showings of less than 100% city grade coverage in allotment proceedings.

one-step procedure would reduce unnecessary duplication of efforts and costs for both the Commission and private parties, which better serves the public interest.

9. Moreover, requiring compliance with the allotment standards in the new one step procedure would ensure that the Commission's core policy objectives, which are promoted by the separation and city grade coverage rules, are not harmed.

10. The Commission traditionally has preferred applicants who propose full compliance with these core technical rules over those applicants who sought approval for less or non-compliant proposals. Thus, the Commission does not, and should continue to not, allow short-spaced proposals where less short-spaced or fully-spaced alternatives exist. The Commission also does not, and should continue to not, allow city grade showings of "substantial compliance" in allotment proceedings. See NPRM footnote 16; and, Greenwood, South Carolina, 3 FCC Rcd 4108 (1988) (87% city grade coverage provided by allotment proposal, but city grade waiver denied as violative of Section 73.315 of the Commission's rules).

11. Also see Naguabo Broadcasting Co., 6 FCC Rcd 912 (Rev. Bd. 1991) (short spacing waiver denied, where no fully spaced sites were available but competing applications were less short spaced; and, city grade waiver denied, where applicant proposed use of translator to cover shortfall); Ettlinger Broadcasting Corp., 53 RR2d 635 (1985) (city grade waiver denied, where applicant proposed use of antenna with directional effects); and, Millard Orick, Jr., 89 FCC 2d 57 (Rev. Bd. 1982) (81.8% city grade coverage proposed but city grade waiver denied, where full city grade coverage provided from alternative sites).

12. Skidelsky recognizes that the use of the more restrictive allotment standards in the new one step procedure may seem harsh to some; but, as pointed out in paragraph 8 above, would present no substantive change in current practice, nor any hardship to private parties. More importantly, it would reduce unnecessary duplication of efforts and costs for both the Commission and private parties, which better serves the public interest.

13. Moreover, the Commission is, as it always has been, free to grant waivers of its rules upon showings of compelling circumstances which are in the public interest (see WAIT v. FCC, 418 F.2d 1153, DCCA 1969) (an applicant for a waiver [of a Commission rule] faces a high hurdle). Thus, for example, the Commission may decide to grant a waiver in a case where a station seeking to upgrade once demonstrated 100% city grade coverage, but is now unable to do so in the face of a community of license that has since grown or expanded.

14. Skidelsky is less certain (yet curious) how the Commission might respond to a situation where two stations seeking upgrades are mutually exclusive with each other, with all other factors being equal except that applicant A proposes 100% city grade coverage while applicant B proposes only 80%.

15. In sum, Skidelsky supports the adoption of the proposed rule change, using allotment standards to avoid harming core policy objectives, such as those reflected in the Commission's technical rules regarding spacing and city grade coverage.

16. Lastly, in accord with the foregoing, Skidelsky suggests that the proposed Notes to Sections 73.203(b) and 73.3573, as set forth in Appendix A of the NPRM, each be revised to add a reference to Section 73.315 (city grade coverage) similar to the one already proposed for Section 73.207 (spacing), such as:

"Note: Changes [...] which, at the site specified in the application, meet the minimum spacing requirements of Section 73.207 of the Rules, without resort to the provisions of the Commission's Rules permitting short spaced stations as set forth in Sections 73.213-215 of the Rules, and which also fully comply with the city grade coverage and other requirements of Section 73.315 of the Rules, without resort to any determination of "substantial compliance", ..."

Respectfully submitted,



Barry Skidelsky

655 Madison Avenue
19th floor
New York, NY 10021

October 3, 1992

(212) 832-4800